No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

IDAHO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent's Brief does not and cannot dispute this crucial record fact: from the day the State filed its notice that it would not seek the death penalty until the close of the sentencing hearing, no one said anything suggesting that the death penalty was still available in this case. Everyone – including the prosecutor – plainly believed that the only issue remaining after the notice was filed was whether the defendant's life sentence would include the possibility of parole.

Even with the perspective of hindsight, Respondent can point to nothing in the record which gave defense counsel a clear and timely signal that she had to defend against a death sentence neither side wanted. The routine advisements to the defendant at arraignment came too early to clarify the dramatically different posture of the case months later, especially for a lawyer who never heard them. The trial judge's puzzling and awkward insertion of the words "or death" into his reflections at the end of the sentencing hearing (J.A. 114) came too late to change a defense case that had already been presented, even if counsel could have discerned their ominous significance.

These points are covered in our opening brief. App. Br. 40-2, 46. We will limit the remainder of our comments here to the new matters raised by Respondent.

1. The Failed Plea Bargain.

Respondent suggests that Judge Reinhardt's rejection of the parties' proposed plea bargain foreshadowed his intention to impose a death sentence. Resp. Br. 12. To the contrary, the rejected plea bargain served only to focus

the one issue everyone understood was unresolved at the time of sentencing: the possibility of parole upon a life sentence. Mr. Longteig, the defense lawyer at trial, testified that the plea bargaining discussions were entered into because "we were very concerned with a fixed term life as opposed to something else." J.A. 78. He had "told Mr. Lankford that he wouldn't get the death penalty" in any event. *Ibid.* Judge Reinhardt said explicitly that the parole issue was what prevented the plea bargain from going through:

> The point of it all is that Mr. Longteig and Mr. Albers, as indicated by the record, approached this Court and asked me to guarantee that Mr. Lankford would be guaranteed possibility of parole in ten years if he pled guilty to two counts of first degree murder. The court rejected that.

J.A. 86.

Far from suggesting there might still be a death sentence, the judge's rejection of the plea agreement served only to reinforce this impression: the issue on which the court was unwilling to be bound by the prosecutor's recommendation – and, therefore, the issue to be litigated at sentencing – was the possibility of parole. As the record clearly reflects, the arguments from both sides proceeded accordingly. J.A. 101-114.

2. The Law of Idaho in 1984.

In retrospect, Respondent's argument from the words of the Idaho statute seems plausible: Section 19-2515(d) does appear to require a penalty hearing in "all cases in

which the death penalty may be imposed." But a preceding subsection – Section 19-2515(a) – equally clearly appears to require "the oral or written suggestion of either party that there are circumstances which may properly be taken into view . . . in aggravation" and "such notice to the adverse party as [the court] . . . may direct." The latter section was the apparent source of the notice requirement the court imposed on the prosecution in this case. Defense counsel reasonably could, and plainly did, believe these statutes made the prosecutor's notice meaningful.

Certainly, nothing in Idaho's caselaw at the time told her the notice was not meaningful. The noncapital cases cited by Respondent for the proposition that a trial court's "sentencing judgment may not be controlled by recommendations of the prosecuting attorney" (Resp. Br. 17) said nothing of the kind.[1] Neither did *State v. Osborn*,

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[1] *State v. Pierce*, 100 Idaho 57, 593 P.2d 392 (1979), held that "it is not improper practice for the prosecution to make a sentencing recommendation." 593 P.2d at 393. *State v. Colyer*, 98 Idaho 32, 557 P.2d 626 (1976), is a guilty plea case that says nothing about the significance of prosecutors' sentencing recommendations. In addressing the validity of the defendant's guilty plea, however, the *Colyer* decision makes a comment that does seem quite pertinent here:

> At a minimum the record must show that appellant realized the possible maximum penalty which could be imposed. We cannot presume he possessed such knowledge. This is amply demonstrated by the fact that at the time sentence was imposed both the prosecuting attorney and appellant's counsel were mistaken as to the maximum sentence.

557 P.2d at 630.

102 Idaho 405, 631 P.2d 187 (1981) hold, as Respondent suggests, that a prosecutor's recommendation is meaningless. The argument rejected by the court in *Osborn* was that the State should "formally notify a defendant of the *particular aggravating circumstance* upon which it will rely." 631 P.2d at 196 (emphasis added). The *Osborn* opinion emphasized that, in that case, the court made "the sentencing possibilities abundantly clear . . . more than once during the proceedings," and the prosecution gave the defendant notice of "the evidence and arguments to be relied upon at the hearing" in support of a death sentence. 631 P.2d at 135-6. *Osborn* hardly could have notified defense counsel here that the death penalty could be imposed, without warning, where there *was* notice, given by court order, that the death penalty was *not* at issue.

Moreover, a second decision in the *Osborn* case, *State v. Osborn (II)*, 104 Idaho 809, 663 P.2d 1111 (Idaho 1983), rejected much the same argument the Respondent is making here: that the provisions of Idaho Code § 19-2515(c)-(e) are mandatory and must be strictly followed in every case, whatever the parties' position. *Osborne II* directly overruled an Idaho Court of Appeals' decision, *State v. Tisdale*, 103 Idaho 836, 654 P.2d 1389 (1982), which had "require[d] district courts to set forth in writing the reasons for imposing a particular sentence." 663 P.2d at 1112. Despite *Tisdale* – and despite sections 2515(d) and (e), which facially required written findings "in all cases in which the death penalty may be imposed" – the Court in *Osborn II* held: "while the setting

forth of reasons for the imposition of a particular sentence would be helpful, and is encouraged, it is not mandatory." *Ibid.*[2]

In short, in 1984 the law of Idaho on this subject was unsettled at best. No amount of study of that law, or the law of any other jurisdiction we can find, would have told defense counsel that the formal, court-ordered notice of the prosecutor's intentions in this case should have been ignored. Certainly nothing told defense counsel that the judge who had ordered that notice – and who, after receiving it, never indicated any intention to disregard it – would do so without prior warning.

3. The Requirements of Due Process.

Respondent echoes and expands upon the Idaho Supreme Court's citation of *Dobbert v. Florida*, 432 U.S. 282 (1977), for the proposition that there is no requirement of a "notice of law," because "[t]he enactments of a legislative body give legally sufficient notice of their contents. . . . " Resp. Br. 16. For that proposition Respondent cites *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Although it is generally far afield from the precise issue here, the decision in *Texaco* included some observations about the due process principle of *Mullane v. Central Hanover Bank*

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[2] Although only two Justices signed the lead opinion in *Osborn II*, it was nonetheless binding precedent. *See State v. Nield*, 106 Idaho 665, 682 P.2d 618, 619 (1984), *reversing State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983).

& Trust Co., 339 U.S. 306 (1950), which answer Respondent's point:

> [In *Mullane*], the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *id.*, at 314; the notice in *Mullane* was deficient "not because in fact it fail[ed] to reach everyone, but because under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.*, at 319.
>
> . . . . The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law. . . .

454 U.S. at 534-35; *see also id.* at 535-37.

The general statutory enactments upon which Respondent relies plainly were not "reasonably calculated" in this case to notify defense counsel that she had to "present [her] . . . objections" to a death sentence. The means of giving her that notice were ready at hand. As Respondent admits, the trial court could have either "accept[ed] the recommendation or . . . announce[d] that the death penalty is still possible." Resp. Br. 27. We are at a loss to understand Respondent's suggestion that such action would have detracted from the judge's impartiality in the case, any more than do the similar warnings regarding possible sentencing consequences required

since *Boykin v. Alabama*, 395 U.S. 238 (1969).[3] *See* Fed. Rule Crim. Pro. 11(e). Certainly, the infinitesimal cost of that announcement would have been more than repaid by the opportunity it would have given counsel to put on a meaningful case for her client's life. *Gardner v. Florida*, 430 U.S. 349, 359-60 (1977) (plurality opinion).

4. The Prejudice to Petitioner's Defense.

Respondent suggests that the fact that defense counsel put on no argument against the death penalty made no difference. Resp. Br. 28-30.[4] The Court rejected a very similar argument made by the State in *Gardner v. Florida*, saying:

> The argument rests on the erroneous premise that the participation of counsel is superfluous in the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us all to recognize the importance of giving counsel an opportunity to comment on

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[3] In notable contrast to this case, the trial judge in *State v. Osborn (I)* "made the sentencing possibilities abundantly clear- . . . more than once during the proceedings." 631 P.2d at 195.

[4] Respondent also suggests that the impact of a lack of notice on the defendant's right to effective assistance of counsel is not properly presented here. Resp. Br. at 30. That is incorrect. Petitioner's argument to the Idaho courts made the same basic factual points, and relied on *Gardner v. Florida*, which held that one of the ways in which "the sentencing process . . . must satisfy the requirements of the Due Process Clause" is in "the effective assistance of counsel." 430 U.S. at 358. *See* Pet. Reply to B.I.O. at App-A-7-9.

> facts which may influence the sentencing decision in capital cases.

Id. at 460 (plurality opinion).

The range of choices made by defense counsel – from her decision to take the case, to her agreement to have her client testify before the same trial judge in his brother's case, to her selection of what experts to consult and what witnesses to call, to her objections and arguments at the hearing itself – is incalculable. Every one of those choices rested on her belief that she was defending only against a fixed life sentence that could be imposed in the judge's discretion, not a sentence of death, ostensibly controlled by specific, and very different, legal standards. In such circumstances, the Court plainly cannot "affirm [the] . . . death sentence by speculating that his defense counsel might have made the same pretrial and trial decisions regardless of the sentencing scheme." *Coleman v. McCormick*, 874 F.2d 1280, 1289 (9th Cir. *en banc*), *cert. denied* 110 S.Ct. 349 (1989); *see also id.* at 1298 (concurring opinion of Judge Trott).

This case begins and ends with this unavoidable fact: The freakish circumstances here left Bryan Lankford with a lawyer who was unaware he was on trial for his life. That cannot comply with the Constitution.

Respectfully submitted,

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